



# **COMMONWEALTH of VIRGINIA**

Molly Joseph Ward  
Secretary of Natural Resources

DEPARTMENT OF ENVIRONMENTAL QUALITY  
Blue Ridge Regional Office  
3019 Peters Creek Road, Roanoke, Virginia 24019  
(540) 562-6700; Fax (540) 562-6725  
[www.deq.virginia.gov](http://www.deq.virginia.gov)

David K. Paylor  
Director

Robert J. Weld  
Regional Director

## **STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO CROP PRODUCTION SERVICES, INC. CLOVERDALE, VA FACILITY**

### **SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Crop Production Services, Inc., regarding its Cloverdale facility, for the purpose of resolving certain alleged violations of the State Water Control Law and the applicable regulations. This Order specifically resolves all civil charges and response costs except as noted in Appendix A below, but does not resolve or settle any potential claims under Va. Code § 62.1-44.15(11) or other applicable authorities for natural resource damages, including value of fish destroyed and expenses incurred in investigating such killing of fish.

### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "305(b) report" means the report required by Section 305(b) of the Clean Water Act (33 United States Code § 1315(b)), and Va. Code § 62.1-44.19:5 for providing Congress and the public an accurate and comprehensive assessment of the quality of State surface waters.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. "BRRO" means the Blue Ridge Regional Office of DEQ, located in Roanoke, Virginia.

4. "CPS" means Crop Production Services, Inc., a corporation authorized to do business in Virginia and its affiliates, partners, and subsidiaries. CPS is a "person" within the meaning of Va. Code § 62.1-44.3.
5. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
6. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
7. "Discharge" means discharge of a pollutant. 9 VAC 25-31-10
8. "Discharge of a pollutant" when used with reference to the requirements of the VPDES permit program means:
  - a. Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
  - b. Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.
9. "Facility" means the CPS facility located at 218 Simmons Drive, Cloverdale, Virginia (Botetourt County), where farm chemicals are stored and distributed. CPS leases a portion of this property.
10. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
11. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
12. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water... 9 VAC 25-31-10.
13. "Pollution" means such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational,

commercial, industrial, agricultural, or other reasonable uses, provided that (i) an alteration of the physical, chemical, or biological property of state waters or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution but which, in combination with such alteration of or discharge or deposit to state waters by other owners, is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution." Va. Code § 62.1-44.3.

14. "Regulation" means the VPDES Permit Regulation, 9 VAC 25-31-10 *et seq.*
15. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.
16. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.
17. "Va. Code" means the Code of Virginia (1950), as amended.
18. "VAC" means the Virginia Administrative Code.
19. "VPDES" means Virginia Pollutant Discharge Elimination System.

#### **SECTION C: Findings of Fact and Conclusions of Law**

1. CPS operated the leased portion of the Facility in July 2017.
2. On July 29, 2017, DEQ received a report of a fish kill in Tinker Creek.
3. Tinker Creek, a tributary of the Roanoke River, is a surface water located wholly within the Commonwealth and is a "state water" under State Water Control Law. The relevant stream segment of Tinker Creek is listed as impaired (Category 5) for aquatic life on the current approved 303(d) list because of exceedances of stockable trout water temperature criteria.
4. DEQ staff and representatives of other state and local agencies responded to the report and investigated the fish kill.
5. The material released was Termix 5301, a highly viscous surfactant product used in herbicide products and applications. The Safety Data Sheet ("SDS") for this product states that it is "very toxic to aquatic organisms, may cause long-term adverse effects in the aquatic environment. Water polluting material." The SDS also states that the

material is classified for United States Department of Transportation shipping purposes as a corrosive material that must be placarded as corrosive and toxic to aquatic life.

6. The release originated from a 275-gallon tote that was stored outside at the CPS facility. The tote was placarded with the appropriate DOT corrosive and aquatic toxicity labels. Approximately 165 to 169 gallons of product was released from the tote. The released product leaked onto a paved area and flowed from there down a clay/gravel slope to a drainage ditch, which discharged into an on-site stormwater pond. The stormwater pond discharged into a dry ditch and then an unnamed tributary of Tinker Creek.
7. CPS was informed of the release at about 9:20 am on July 29, 2017. Shortly thereafter, CPS hired WEL, an environmental response contractor, to handle response and remediation. WEL excavated all contaminated soil from a ditch and detention basin on facility property, took multiple stream samples, and vacuumed all free product from the storm drain system, flushed the system, and contained and removed the flush water.
8. Va. Code § 62.1-44.5 states that: "[E]xcept in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances."
9. The Regulation, at 9 VAC 25-31-50, also states that except in compliance with a VPDES permit, or another permit issued by the Board, it is unlawful to discharge into state waters sewage, industrial wastes or other wastes.
10. The Regulation, at 9 VAC 25-660-10(A), states that: "All state waters, including wetlands, are designated for the following uses: recreational uses, e.g., swimming and boating; the propagation and growth of a balanced, indigenous population of aquatic life, including game fish, which might reasonably be expected to inhabit them; wildlife; and the production of edible and marketable natural resources, e.g., fish and shellfish."
11. The Water Quality Standards at 9 VAC 25-260-20(A) state in part that: "[S]tate waters, including wetlands, shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant or aquatic life. Specific substances to be controlled include . . . toxic substances."
12. The Regulation, at 9 VAC 25-260-140(A) states in part that "Instream water quality conditions shall not be acutely or chronically toxic except as allowed in 9 VAC 25-260-20(B) (mixing zones). The following are the definitions of acute and chronic toxicity conditions: 'Acute toxicity' means an adverse effect that usually occurs shortly after exposure to a pollutant. Lethality to an organism is the usual measure of acute toxicity. Where death is not easily detected, immobilization is considered the equivalent of death."
13. Va. Code § 62.1-44.15(5a) states that a VPDES permit is a "certificate" under the statute.

14. The Department has issued no discharge permits or certificates to CPS.
15. On October 4, 2017, the Department issued NOV No. 17-10-BRRO-002 to CPS for the violations described in paragraphs C(2) - C(7), above.
16. On October 11, 2017, CPS contacted DEQ staff in response to the NOV to discuss this matter and subsequently provided an incident summary.
17. Based on the results of the July 29, 2017 site visit and follow-up investigations, the Board concludes that CPS has violated Va. Code § 62.1-44.5, 9 VAC 25-31-50, 9 VAC 25-260-20(A), and 9 VAC 25-260-140(A), as described in paragraphs C(2) – C(7), above.
18. CPS has submitted documentation that verifies that the violations described in paragraph C(2) – C(7) have been corrected.

**SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15 and §10.1-2502, the Board orders CPS, and CPS agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$58,500.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order; and
3. Reimburse DEQ \$28,064.36 for DEQ environmental pollution incident response costs within 30 days of the effective date of the Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

CPS shall include its Federal Employer Identification Number (FEIN) ( 04-3769161 ) with the civil charge payment and shall indicate that the payment of the civil charge is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, CPS shall be liable for attorneys' fees of 30% of the amount outstanding.

**SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of CPS for good cause shown by CPS, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, CPS admits the jurisdictional allegations, and agrees not to contest, but does not admit, the findings of fact and conclusions of law in this Order.
4. CPS consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. With regard to the matters specified in Section A, CPS declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein, except that CPS reserves its right to a hearing or other administrative proceeding authorized or required by law or to judicial review of any issue of fact or law contained in any subsequent amendments of this Order issued by the Board without the consent of CPS. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by CPS to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority. CPS does not waive any rights or objections it may have in any enforcement action by other federal, state, or local authorities arising out of the same or similar facts to those recited in this Order.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. CPS shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. CPS shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. CPS shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
- a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
  - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and CPS.
11. This Order shall continue in effect until:
- a. The Director or his designee terminates the Order after CPS has completed all of the requirements of the Order;
  - b. CPS petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
  - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to CPS.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve CPS from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by CPS and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. The undersigned representative of CPS certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind CPS to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of CPS.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, CPS voluntarily agrees to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_ .

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Robert J. Weld, Regional Director  
Department of Environmental Quality



Crop Production Services, Inc. voluntarily agrees to the issuance of this Order.

Date: 7-17-18

By: Sherri Kuhlmann

State of Colorado  
County of Larimer

The foregoing document was signed and acknowledged before me this 17<sup>th</sup> day of July, 2018, by Sherri Kuhlmann, who is Vice President, of Crop Production Services, Inc., on behalf of the company.



Felicia Aragon  
Notary Public

20134031493

Registration No.

My commission expires: May 16, 2021

Notary seal:

## **APPENDIX A SCHEDULE OF COMPLIANCE**

### **1. Ongoing Troutville Town Well Monitoring**

- a. CPS shall sample the Town of Troutville Drinking Water Well #5 ("Well #5") for nonylphenol ("NP") and nonylphenol ethoxylates ("NPE") in February 2018 and again in May 2018. Sample collection shall be coordinated with the Town of Troutville. Samples will be analyzed by the Virginia Division of Consolidated Laboratory Services ("DCLS"). Costs for analysis by DCLS shall be reimbursed to DEQ by CPS. DEQ will submit invoices to CPS with itemization of these costs along with the analytical results and reports, if any. CPS shall remit payment of those invoices within 30 days of receipt of such documentation, with payment to be made as specified in Section D of this Order.
- b. If NP and/or NPE is detected in either of the two monitoring events specified above, CPS shall submit to DEQ for review and approval a monitoring and remediation plan ("Plan") for remediation of Well #5 in accordance with the applicable regulations. CPS shall comply with the Plan after it is approved by DEQ.

### **2. DEQ Contact**

Unless otherwise specified in this Order, CPS shall submit notice of activities required by the Schedule of Compliance as set forth in Appendix A of this Order to:

Robert Steele  
VA DEQ –Blue Ridge Regional Office  
3019 Peters Creek Road  
Roanoke, VA 24019

Phone: (540) 562-6777  
Fax: (540) 562-6725  
Email: Robert.Steele@deq.virginia.gov